

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an Appeal from a
judgment of the Court of Appeal.

1. Yuni Motors (Pvt.) Ltd.,
No. 105, New Bullers Road,
Colombo 4.
2. Yasasiri Kasturiarachchi,
Chairman/Managing Director,
Yuni Motors (Pvt) Ltd.,
No. 34, Vajira Road,
Colombo 5.

PETITIONERS

S.C. Appeal No. 79/2006

S.C.Spl. LA No. 163/2006

C.A.Application No. 2314/2004

Vs.

1. S.A.C.S.W. Jayatillake
Director General of Excise (Special
Provisions), 3rd Floor,
Bristol Street, Paradise Building,
Colombo 1.
2. Sarath Amunugama,
Minister of Finance,
Ministry of Finance,
Colombo 1.
3. The Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

AND NOW BETWEEN

1. Yuni Motors (Pvt) Ltd.,
No. 105, New Bullers Road,
Colombo 4.
2. Yasasiri Kasturiarachchi,
Chairman/Managing Director,
Yuni Motors (Pvt) Ltd.,
No. 34, Vajira Road,
Colombo 5.

PETITIONER – PETITIONERS

Vs.

1. S.A.C.S.W. Jayatilleke,
Director General of Exercise,
(Special Provisions)
3rd Floor, Bristol Paradise Building,
Colombno 1.
2. Sarath Amunugama,
Former Minister of Finance,
Ministry of Public Administration,
Independence Square,
Colombo 7.
3. The Attorney General,
Attorney – General’s Department,
Colombo 12.

RESPONDENT-RESPONDENTS

BEFORE : **Eva Wanasundera, PC. J**
Buwaneka Aluwihare, PC.J. &
Sisira J.de Abrew, J.

COUNSEL : L.M.K. Arulanandam, PC. With R.Y.S. Jayasekara and
Manoj Uduwana for the Petitioners-Appellants.
Janak de Silva, DSG. For the Respondents.-Respondents.

ARGUED ON : **22.09.2014**

DECIDED ON : **03.12.2014**

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EVA WANASUNDERA, PC.J.

In this matter special leave to appeal was granted on 13.09.2006 from the judgment of the Court of Appeal dated 22.05.2006 in respect of questions of law set out in paragraph 29 (a), (c), (d) and (e) of the Petition dated 30. 06. 2006. The said questions are :-

- 29 (a) Did the Court of Appeal err by its failure to arrive at a finding that any provision imposing a tax on a person has to be strictly construed in favour of the person against whom it is purported to be directed?
- (c) Did the Court of Appeal err by arriving at a finding that the said provision under HS Code 8703.32.12 “ did not exclude new cars” and that,“ therefore the Petitioners cannot argue that the description given under the said HS Code does not cover the cars manufactured in Sri Lanka?
- (d) Did the Court of Appeal err by failing to consider the bearing the words “not more than three years old” in the said provision had on the pivotal Issue in the application before it which was whether the said provision was applicable to the new cars manufactured by the 1st Petitioner in Sri Lanka?
- (e) Did the Court of Appeal err by acting on the presumption that the Legislature intended to impose excise duty on new locally manufactured cars?

Facts pertinent to this Appeal are as follows:

The first Petitioner-Appellant (hereinafter referred to as the 1st Appellant), is a company duly incorporated in Sri Lanka. The second Petitioner - Appellant (hereinafter referred to as the 2nd Appellant), is the Chairman of the company. This company is engaged in the business of assembling new motor cars out of new parts imported from Hindustan Motors Limited of India under a license from the Hindustan Motors Ltd. After assembling the parts the product is a new motor car. So, the 1st Appellant becomes a manufacturer of motor cars.

On or about 14.11.2003 the 1st Appellant received a letter from the 1st Respondent, Director General of Excise (Special Provisions) directing it to register itself under Sec. 14 of the Excise (Special Provisions) Act No. 13 of 1989. The Appellants state that such registration was required only if the 2nd Respondent, the Minister made order under Sec. 3 of the said Act, declaring the type of vehicle manufactured by the 1st Appellant as an item upon which Excise Duty was to be levied.

The 1st Respondent continued to send letters to the 1st Appellant to register under Sec. 14 and pay the excise duty but as it did not do so, a final notice dated 26.08.2004 was sent to the 1st Appellant. The Appellants made an application to the Court of Appeal to quash the decisions of the Respondents and interim relief was granted in favour of the Appellants on 30.11.2004 but at the conclusion of the case, the Court of Appeal dismissed the application of the Appellants on 22.05.2006.

I observe that by an order made by the Minister under Sec. 3 of the said Act, published in the Gazette Extraordinary No. 1228/14 of 22.03.2002, certain categories of vehicles were included as excisable items in terms of Sec. 3. In the said order under HS Code 8703.32.12, the description of which reads as "motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000 cc not more than three years old" was subjected to an excise duty of 65%.

The Appellants are now before this Court against the said judgment. The 1st and 2nd Appellants contend that " the motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000cc " , which are manufactured by them are new cars

and therefore they cannot be taken as cars coming under HS Code 8703.32.12 for which excise duty can be levied and as such the 1st Appellant Company need not be registered under Sec. 14 of the Act. Furthermore they state that there is no express provision in the said Gazette notification for the levy of Excise Duty on locally manufactured motor vehicles.

Sec. 3(1) of the Excise (Special Provisions) Act No. 13 of 1989 reads:-

“ There shall be charged, levied and paid **on every article manufactured or produced or imported into Sri Lanka**, an excise duty at such rate or rates as may be specified by the Minister, by order published in the Gazette. Every such article in respect of which an order is made under this Section is hereafter referred to as **an excisable article**”

Sec. 14(1) of the Excise (Special Provisions) Act No. 13 of 1989 reads:-

“On and after the expiration of a period of two months from the date on which any article becomes **an excisable article** in pursuance of an order made under Sec. 3, **no person shall**, unless registered for the purpose of this Act with the Director General **engage in the production** of any such excisable article...”

I observe **that if the article is mentioned** in the order of the Minister in the Gazette, the manufacturer is by law bound to pay the excise duty and within two months from the date of the gazette, the manufacturer should register with the Director General of Excise if he/it wants to engage in the production of that article. The question to be decided is whether the newly manufactured motor cars could be recognized as an article mentioned in the order of the Minister under Sec. 3. Does that article come under the category described in HS Code 8703.32.12 in the Gazettes marked as P4 , P6 an P7? The said Gazettes which bear the orders of the Minister are Nos. 1228/14, 1341/28 and 1356/11.

In the said orders under Sec. 3 published in the Gazettes, the excisable articles are classified primarily by HS Headings and then sub classified as HS Codes under each HS Heading. This is done in accordance with the Harmonized Commodity Description and Coding System, commonly known as HS Codes based on the International

Convention on the Harmonized Commodity Description and Coding System to which Sri Lanka is a party. I understand that depending on national requirements, a commodity can be sub-divided at national level from time to time which too may be changed from time to time based on national requirements.

In the Court of Appeal, the 2nd Respondent-Respondent filed an affidavit with many documents and the document marked 2R3 is the Gazette No. 1119/5 dated 14.2.2000 containing the Minister's order under Sec. 3(1) of the Excise (Special Provisions) Act No.13 of 1989 as amended. Quite interestingly, this order contained the same article/item, namely, "motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000cc" under HS Code allocated to that category at that time, i.e. 8703.32.06. The rate of excise duty was 65%.

It is reproduced as follows:-

| I HS Heading | II HS Code | III Description | IV Rate of Excise Duty |
|-----------------|---------------|---|------------------------------|
| 87.03 | 8703.32.06 | Motor cars including Station Wagons and Racing Cars of a Cylinder capacity exceeding 2000 cc | 65% |

It is clear to me that according to this order of the Minister in the year 2000, published in the Gazette that all the manufacturers and importers of the said item/article became liable to pay the excise duty of 65% at that time, according to law. The qualifying words "not more than three years old" did not appear therein. **The article /item on which excise duty was payable at the rate of 65%, in the year 2000, namely, "motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000cc" was for manufacturers as well as importers.**

This fact is full proof of the fact that the Director General of Excise had been levying excise duty from manufacturers of the specific item in question from the year 2000. There could be no good reason or rationale for the government to decide against charging the manufacturers in later years. It is observed that no such policy decision was made by the government to that effect after the year 2000 and that is why the

Director of Excise continued to include the same item/article in the latter years only dividing the item into two sections, namely ‘ motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000 cc **not more than three years old** ‘ and ‘motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000 cc **more than three years old**’ but continued to charge **the same excise duty at the rate of 65% for both categories.**

When it is simplified, all the motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000 cc, without any difference of age are subject to an excise duty at the rate of 65% from the manufacturers as well as from the importers. It is evident from the wording in Gazettes P4 and P6. I wish to reproduce the portion containing the said item in both gazettes as follows:-

P4

The Gazette of the Democratic Socialist Republic of Sri Lanka
Extraordinary
No. 1228/14 – Friday, March 22, 2002
Government Notifications

EXCISE (SPECIAL PROVISIONS) ACT No. 13 OF 1989
ORDER UNDER SECTION 3

By virtue of the powers vested in me by Section 3 of the Excise Duty (Special Provisions) Act No. 13 of 1989, I, Kairshasp Nariman Choksy, Minister of Finance, do by this Order declare that with effect from 23rd March, 2002, Excise Duty on every Article specified in Column III of the Schedule hereto shall be payable at the rate specified in the Corresponding entry in Column IV of that Schedule. Orders made under Section 3 of the Act and published in Gazette No. 1119/5 of 14 th February, 2000 are hereby rescinded.

Kairshasp Nariman Choksy.
Minister of Finance.

| I HS <u>Heading</u> | II HS <u>Code</u> | III <u>Description</u> | IV <u>Rate of Excise Duty</u> |
|---------------------------|-------------------------|--|----------------------------------|
| 87.03 | 8703.32.12 | Motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000 cc not more than three years old | 65% |
| | 8703.32.13 | Motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000cc more than three years old | 65% |

P6

GAZETTE EXTRAORDINARY OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI
LANKA NO 1341/28 - 20.05.2004.
EXCISE (SPECIAL PROVISIONS) ACT No. 13 of 1989
Order under Section 3

By virtue of the powers vested in me by Section 3 of the Excise (Special Provisions) Act No. 13 of 1989, I, Sarath Amunugama, Minister of Finance, do by this order declare that with effect from 19th May, 2004, Excise Duty on every Article specified in Column III of the Schedule hereto shall be payable at the rate specified in the Corresponding entry in Column IV of that Schedule. Orders made under Section 3 of the Act and published in Gazette No. 1228/14 of 22nd March, 2002, Gazette No. 1283/15 of 09th April, 2003, Gazette No. 1299/12 of 31st July, 2003 and Gazette No. 1303/7 of 25th August, 2003 are hereby rescinded.

Ministry of Finance
Colombo 01.
19th May, 2004.

Dr. Sarath Amunugama
Minister of Finance

| I HS <u>Heading</u> | II HS <u>Code</u> | III <u>Description</u> | IV <u>Rate of Excise Duty</u> |
|---------------------------|-------------------------|---|----------------------------------|
| 87.03 | 8703.32.12 | Motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000 cc not more than three and a half years old | 65% |
| | 8703.32.13 | Motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000cc more than three and a half years old | 65% |

Furthermore, I would like to analyze the wording in Gazette P7, namely No. 1356/11 dated 01.09.2004. By this order of the Minister, the local manufacturers of vehicles are given a concessionary rate of 32.5%, which is exactly half of the rate of 65% mentioned in earlier gazettes for a period of two years from the date of commencement of the production of such vehicles. **I find that only HS Codes are mentioned in this order without a description and those codes which are related to locally manufactured vehicles are given the concessionary rate.**

The counsel for the Appellants argued that “no HS Code or Heading can be related to the vehicles manufactured anew” in the said Gazette with which I totally disagree because the wording is quite clear that the local manufacturers have to pay excise duty on motor cars exceeding 2000 cc cylinder capacity which are manufactured anew with locally manufactured components or imported components according to this Gazette notification. I reproduce the said gazette P7 below:-

P7

The Gazette of the Democratic Socialist Republic of Sri Lanka
Extraordinary
No. 1356/11 – Wednesday, September 01, 2004.
Government Notifications

EXCISE (SPECIAL PROVISIONS) ACT No. 13 OF 1989
ORDER UNDER SECTION 3

By virtue of the powers vested in me by Section 3 of the Excise (Special Provisions) Act, No. 13 of 1989, I, Sarath Amunugama, Minister of Finance, do by this Order specify that with effect from 01st September, 2004, the rate of excise duty payable on all locally manufactured motor vehicles falling within the HS Heading, HS Code specified in Column I and Column II respectively of the Schedule hereto, **in so far as such Heading and Code can be related to locally manufactured vehicles**, shall be as specified in the corresponding entry in Column III of that Schedule, subject to the following conditions:--

- (a) Over fifty percent of the cost of production of the motor vehicles shall be on locally manufactured components as recommended by the Minister in Charge of the subject of Industries, verified by a certificate issued by such Minister to that effect: and

(b) The payment of excise duty on locally manufactured motor vehicles at the rate specified by this Order is granted to each such manufacturer only for a period of two years from the date of commencement of the production of such vehicles.

The excise duty rates imposed by Order published in Gazette No. 1341/28 of May 20th, 2004 shall not apply in respect of locally manufactured vehicles referred to in paragraph (b) of this Order.

The Ministry of Finance
Colombo 01.
01st September, 2004.

Dr. Sarath Amunugama
Minister of Finance

SCHEDULE

| I | II | III |
|---------|------------|---------------------|
| HS | HS | Rate of Excise Duty |
| Heading | Code | |
| 87.03 | 8703.32.12 | 32.5%. |

Incidentally, It seems nothing but rational for anyone to wonder why the Minister has not specifically made order under Sec. 3 mentioning clearly, that ‘newly manufactured motor cars ‘ within Sri Lanka should be imposed 65% excise duty or a lesser duty.

The reason is that he is not empowered to do so according to the wording of Sec. 3 of the Act. The wording of the Act is in compliance with the obligations that Sri Lanka has undertaken in terms of the General Agreement on Tariffs and Trade (GATT). Article III of GATT specifies that “The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products”. Therefore it is obvious that the wording of Sec. 3 has been put in place accordingly. The power of the Minister to make an order under this Section is limited to specifying the article and the rates at which the excise duty is to be charged, levied and paid. The Minister does not have the power, in terms of the section to make a distinction between articles manufactured or produced in Sri Lanka and articles imported into Sri Lanka when specifying the excise duty rate.

For example the Minister cannot by any order under Sec 3 specify an excise duty rate only on imported articles and exempt similar articles manufactured or produced in Sri Lanka. Once the Minister makes order specifying the article and the rate, excise duty has to be charged, levied and paid on all such excisable articles manufactured or produced in Sri Lanka or imported into Sri Lanka at the rate specified. The non – discrimination between imported and domestic like products is an obligation undertaken by Sri Lanka under GATT 1947.

It is an accepted rule of law, that the interpretation given to orders made under section 3 should be consistent with the ambit of the section or else it is ultra vires. In this appeal, the Appellants argue that the rules made under section 3, to quote, “motor cars not more than three years old” does not include newly manufactured cars.

I hold that it is a matter of interpretation of the subordinate legislation in compliance with the Statute. May I quote Bindra’s Interpretation of Statutes, 8th Edition, at page 744:

“ The rule of interpretation is that if subordinate legislation is directly repugnant to the general purpose of the Act which authorizes it, or indeed repugnant to any well established principle of statute..., it is either ultra vires altogether, or must, if possible, be so interpreted as not to create an anomaly ”.

It is explicitly clear that the manufacturers should pay excise duty according to section 3. The contention is that new cars are not mentioned per se in the rules containing the rates of duty and therefore the manufacturer is not legally bound to pay. There is an anomaly created in such an interpretation. Should the rule be interpreted to exclude them from liability to pay any excise duty or should it be interpreted to include them to be liable to pay the duty? When the statute states that excise duty should be paid, then only the article /item and the rate of the duty is decided by the rules.

The rule under which excise duty can be paid, to fall in line with Section 3, under classification HS Code 8703.32.12, is described as “motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000 cc not more than 3 years old”. How old is a car manufactured on the date of manufacture? At the end of

the day, it is one day old. Is it less than 3 years of age. Yes, it is. When cars are manufactured for the first time, under section 14 of the Act, within two months from the date of manufacture, the manufacturer has to register with the Director General of Excise and be ready to pay excise duty. All the cars on this island have an age whether they are imported or manufactured. On a simple reading itself, the manufacturer of new cars fit into the category of “motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000 cc not more than 3 years old”. If it is interpreted otherwise only, an anomaly is created. As such, according to the rules of interpretation also, the newly manufactured cars are liable to be charged for excise duty.

I find that the Court of Appeal after having given interim relief which continued to be effective for two years, has considered the facts and the law quite correctly at the end of the hearing and given judgment dismissing the application made by the Appellants to quash the orders of the 1st and 2nd Respondents contained in the documents referred in their application. I answer the questions of law enumerated at the beginning of this judgment in the negative. I find no reason to interfere with the said judgment of the Court of Appeal. I affirm the said judgment dated 22.05.2006.

For the reasons set out above, I dismiss this appeal with costs.

Judge of the Supreme Court

Buwaneka Aluwihare, PC.J.

I agree.

Judge of the Supreme Court

Sisira J.de Abrew, J.

I agree.

Judge of the Supreme Court